requires a long list of factors to be assembled on a system-by-system basis. Potential factors identified include:

* Demand factors
* Cost-related factors
* Channels in the basic tier
* Channels in basic tier that are satellite based
* Number of subscribers
* Number of channels available
* Age of head-end
* Household income
* Household size
* City or county size
* Bundling of services

After gathering these data, the Commission must engage in a subjective data manipulating exercise to come up with a cost analysis. More importantly, even if one had a good set of factors to explain rates and a good set of categories by which to classify systems, the Commission will have difficulty interpolating values within cells and then will have to estimate a "zone of reasonableness" arbitrarily.

After this quasi-cost analysis is done, the real cost analysis begins. Cable operators are to be allowed direct pass-through (direct cost plus overhead, plus reasonable profit)

on a number of items. To inflate rates, the industry is more than willing to provide data on a wide array of costs including:

* new program services
* increases in equipment costs above inflation
* increases in programming costs above inflation
* rate increase for old program services
* new PEG costs
* retransmission fees
* franchise fees and taxes
* labor costs for equipment, installation and studio personnel
* capital costs for studios
* capital costs for bandwidth

CFA believes that if the Commission engages in cost analysis, it must do so across the board, not as a one-way rate esclation mechanism above benchmarks.

IV. CONTINENTAL CABLEVISION'S RATEBASE AND COST OF CAPITAL ARGUMENTS VIOLATE THE CABLE ACT AND PRINCIPLES OF SOUND REGULATORY PRACTICE

Continental Cablevision's comments present an approach to regulation that would result in an upward spiral of rates. The argument is somewhat different, or at least more explicit, than

the other cable industry comments. It tries to defend excessive purchase prices of cable systems or capital expenditures as "legitimate" costs, if a cost-of-service approach is adopted by the Commission. This argument merits close consideration by the Commission, but it must be rejected as violating not only the Cable Act, but also the general principles of regulation. It has no basis either in law or economic analysis.

A. MONOPOLY POWER AS CAPITALIZED GOODWILL VIOLATES THE LAW

Continental's definition of the ratebase, for purposes of cost-of-service regulation, must be rejected by the Commission, since it cannot identify rates that will be excessive due to the exercise of market power. Continental argues, in essence, that whatever it decides to spend on the acquisition of new systems or investment in new plant must be put into the ratebase.

No matter how large the discrepancy between the value of the underlying assets and the purchase price, no matter how unrealistic the projections of revenue, in Continental's scheme the cable operator must be allowed to recover all of the investment because it has invested in goodwill, going concern value, intangible assets, and/or the expectation of realizing future revenues. There can be no excess disallowed by the Commission because value is in the eye of the investor:

> The cable industry, built upon growth expectations and deferred gains, typically has been analyzed in terms of its cash flow multiples. Because this method of analysis is entirely unaffected by whether a particular industry or firm possesses market power, a rate regulation regime could utilize cash flow multiples in order to demonstrate that the "goodwill" of the industry is small or nonexistent. Generally, what might be termed "goodwill" is really the "going concern value" for a cable system...
>
> The major intangible asset is the franchise operating rights, which together with going concern value and other purchased intangibles belongs in the ratebase...
>
> To the extent that the acquisition price of a system also reflects the purchaser's expectation of realizing higher future revenues from these optional services, the economic value should be part of the "rate base."[87]

If growth expectations or expectations of future revenues rely on assumptions about market power, under Continental's view, the Commission can only ratify those expectations by including their purchase price in the ratebase. The ratebase becomes a witches brew of goodwill, intangibles, and expectations of future earnings.

Continental offers two citations in support of its claim to include goodwill and other intangibles in the ratebase. Neither of these has anything to do with a regulatory treatment of such issues. Moreover, these articles make it clear just how murky the status of the mix of goodwill and intangibles is. Davis ("Goodwill Accounting: Time for an Overhaul," Journal of

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[87] Comments of Continental, Appendix B at 4-6.

Accountancy, June 1992) is arguing that the Internal Revenue Service should change it policy of not recognizing goodwill for tax purposes. The refusal of the IRS to recognize it as a legitimate cost for tax purposes should be noted by the Commission. He further admits that the accounting profession has great difficulty in defining goodwill:

> Goodwill probably is the most intangible of intangibles because it is difficult to determine exactly what it is. In practice it has evolved to include everything contributing to an existing business's advantage over a new one or anything that enhances a company's earning potential...
>
> In spite of the many formulas available to estimate superior earning power - and these often are used to determining what price to bid for a target company - the actual amount recorded on the balance sheet is a "plug," or residual number. The plug is the difference between the total price paid for a company and the fair market value (FMV) of its identifiable net assets, including intangible assets for which an FMV reasonably can be determined.[88]

This formulation makes it clear that the Commission cannot accept Continental's definition of good will or intangibles, since the bedrock of that value may well be the undue exercise of market power.

The second source cited by Continental provides no greater evidence to support Continental's viewpoint.[89] Again, this

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[88] Davis, op. cit., at 77.

[89] Ciesielski, J.T., "Tapping Goodwill: It Helps Forecast a Company's Earnings," Barrons, October 26. 1992.

article is driven by the refusal of the IRS to recognize good will as a legitimate cost. It describes the current situation as follows:

> One of the legacies of the 1980s is goodwill - not the kind that warms your heart, but the kind that bloats the balance sheets of most companies that have undergone leveraged buyouts.[90]

If the Commission were to accept Continental's view of goodwill, cable operators will have every incentive to just keep turning systems over at prices far in excess of the asset value of these firms, and pad the ratebase with excessive costs.

In a competitive market, uneconomic investment would not be supported by market prices. Congress has charged the Commission with protecting ratepayers from the exercise of undue market power. It has explicitly referred to a desire to replicate competitive market situations. Therefore, Continental's conceptualization of the ratebase is simply illegal under the Cable Act. It is also inconsistent with the general regulatory authority cited by the Commission (i.e., Hope and Bluefield),[91] and cited by Continental itself (Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989), where the Supreme Court upheld a

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[90] Ciesielski, op. cit., at 16.

[91] See also Jersey Central Power & Light Co. v. F.E.R.C. op. cit., cited supra. at footnote 80.

disallowance of nuclear power plant construction costs as not a "taking" of property).[92]

B. CONTINENTAL'S CLAIM ON SUBSCRIBERS FOR EXCESSIVELY PRICED MONOPOLY POWER ALREADY PAID FOR IS WITHOUT LEGAL OR ECONOMIC FOUNDATION

The effort to defend monopoly power as capitalized goodwill (renamed "going concern value") presents the Commission with a more difficult task when the cable operator comes to the table with prior expenditures for monopoly power. Continental's plea is, above all, an effort to recover past excesses which were capitalized in it's purchase price:

> Any regulatory regime must consider the need to recapture already deployed capital.[93]
>
> Going Concern Value is a cost of acquisition which requires a return of investment. Therefore, this amount must be included in the ratebase. If it is not, then certainly the amortization should be recoverable as a current expense.[94]

Continental paid outrageous prices to purchase monopoly power. Those costs appear as obligations on the books of the

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[92] Comments of Continental at FN 11.

[93] Id., at 9.

[94] Id., at 15.

company. What sort of claim does this give Continental on subscribers' pocketbooks? Before we describe an appropriate regulatory response, we must give some careful thought to the underlying economics of the situation.

1. REAL RISK MUST BE BORNE BY INVESTORS

First, it should be noted that Continental would not have a guaranteed right to recover all its costs under any regulatory or market regime. It is ironic that Continental uses the real estate industry as its role model (for accounting purposes). Anyone who bought property in the West at the hugely inflated rates of the mid-1980s is likely to have lost a bundle. Continental has no right to ask subscribers of cable systems in the West to hold it harmless against its decision to pay an excessive price for a cable system. The reproduction costs of a cable system in 1986 were in the range of $300 to $500 dollars. In a competitive marketplace, to pay three times that is a decision that would be looked on with grave doubt.

2. REVENUES PROJECTED ON THE BASIS OF MARKET POWER ARE ILLEGAL

Second, sources of revenue that are based on market power are frowned on in our society, whether or not an industry is regulated. Thus, individuals who expect to be able to collect monopoly rents because they have a franchise, or otherwise

believe that they can avoid competition, have based their expectations on improper factors. The obvious counterpart to the unregulated real estate market is the regulated nuclear power plant industry. The builders of those power plants "expected" to simply pass costs along to their captive ratepayers, no matter how outrageous they became in comparison to alternative technologies. They were wrong. Regulators denied them a large part of their return and the courts have repeatedly upheld those decisions:

> In addition to prohibiting rates so low as to be confiscatory, the holding of Hope Natural Gas makes clear that exploitative rates are illegal as well . . . A regulated utility has no constitutional right to a profit . . . and a company that is unable to survive without charging exploitative rates has no entitlement to such rates.[95]

3. REGULATORY RISK IS BORNE BY INVESTORS

Third, even decisions based on assumptions about regulatory policy are subject to risk. Ironically, Continental insists that franchising authorities should have factored the possibility of reregulation into their thinking, before the 1992 Act was passed: "The reality too is that franchise negotiators were well aware

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[95] Jersey Central Power & Light Co. v. F.E.R.C., op. cit., at 1180-81 (citations omitted).

that federal deregulation might not remain.[96]

Thus, Continental itself should have been aware that reregulation was a possibility.[97] Certainly by 1988 there was already talk of reregulation, as skyrocketing prices and rates angered consumers. By 1989, legislation had been introduced. Buying monopoly power was increasingly risky business.

4. THERE HAVE BEEN MANY WINNERS IN THE BIDDING FOR MONOPOLY POWER

Fourth, Continental alleges that the lack of dividends paid to investors implies a long term commitment to building the industry. Because cable operators take their gains in appreciation of system value, they cannot possibly be exploiting monopoly power. While this may be true in some instances, it is not at all clear that this is the rule industry-wide.

Continental fails to note that half of all systems were sold

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[96] Comments of Continental Cablevision at 18.

[97] It is important to note that the cable industry has been on notice throughout the 1980s that the degree of regulation it would face was dependent upon the degree of competition in the market. Although lawmakers and regulators have adjusted the definition of "effective competition," they have not changed the focus of when cable's pricing practices may require regulatory constraint; cable has remained regulated in many of its activities and regulatable as to its rates, depending on market conditions, throughout recent history.

in just the six years after deregulation. Half of them took their so called "long term gains" very quickly after deregulation unleashed their market power. It appears that, on a weighted basis, two-thirds of all subscribers were "transacted" over the period.

Moreover, many of the deals which were used to raise the huge sums of capital consumed by the industry in its buying frenzy are limited partnerships. They pay very nice returns, with tax advantages, to their investors.

In other cases, the so called "owners" of the system actually have little equity at stake. They have taken very little risk, while the bondholders have received nice rewards in the form of the very high interest rates noted below.

5. THE ORIGIN OF RISK IN THE CABLE INDUSTRY RESIDES IN EXCESSIVE BIDDING FOR MARKET POWER

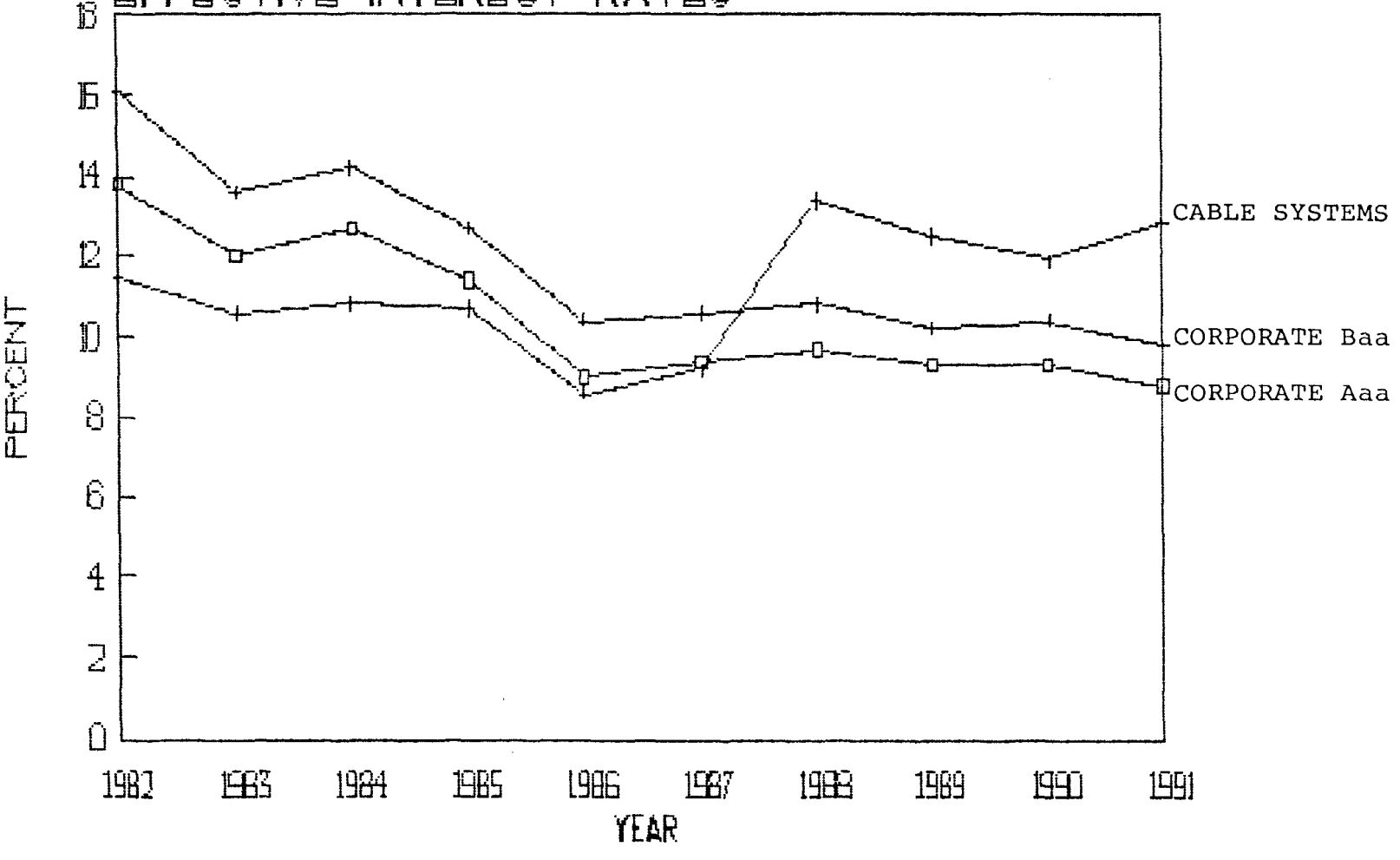
Finally, these observations cast a rather different light on the assertions, offered by Continental and its consultants, that cable companies paid a risk premium far above that of other industries because of the inherent nature of their business. While there is currently a risk premium being paid, we think it has to do with the precarious nature of monopoly power in an economic and political system which is hostile to the abuse of

market power.

What Continental and its consultants fail to note is that the risk premium paid by the cable industry did not exist until the purchase price of systems was driven to outrageous levels. When cable companies let the purchase price rest more and more on the exercise of market power, the bankers/financiers began to recognize the risk involved. There is nothing inherently risky about the industry. It is cable's unseemly economic behavior that created the risk.

Figure R-1 shows this clearly. Cable industry debt was purchased below AAA and Baa corporate bonds from the early 1980s until 1987. Thereafter, it started to pay a very high premium. The risk premium grew as the purchase price mounted. This risk is obviously not inherent in the nature of the industry. The

FIGURE R-1:
EFFECTIVE INTEREST RATES



PAUL KAGAN ASSOCIATES, CABLE MASTER DATABASE, 1992
ECONOMIC REPORT OF THE PRESIDENT, 1992, TABLE B-69

post-1987 "jump" in risk (i.e., interest rates) demonstrates that risk attaches to purchase prices that had lost touch with economic reality.

One of the sources cited by Continental gives an national average of total intangibles for the Standard and Poor's 500 of less than ten percent of total assets.[98] The same article points out that in the Time Warner merger of 1989, 80 percent of the transaction was made up of the most "intangible of intangibles," goodwill.[99] There should be little wonder that the bankers imposed a high risk premium on these deals that were "bloated" with goodwill.

C. THE COMMISSION HAS A PRACTICAL, COURT-TESTED REGULATORY RESPONSE TO MONOPOLY POWER ALREADY PAID FOR

CFA's regulatory proposal, described in our initial comments, dealt with Continental's problem. It would allow every system to make the showing that the system-specific benchmark is too constraining on overpriced systems. The Commission would look at the real equity that the owner has at risk in the enterprise. In many cases it never was very large. In some cases it has been sharply depreciated, while cash flow has paid off bondholders. The Commission must look past the facade of

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[98] Davis, op. cit., at 79.

[99] Id., at 76.

overblown claims to "intangibles" or "good will" on which the industry relies, and ascertain the real assets placed at risk.[100]

We also believe there is a covenant between the subscriber and the franchise holder. We have outlined this covenant in relation to an analogous situation, nuclear power plants.[101] The key sections of this testimony are restated below:

1. A MONUMENTAL FAILURE OF UTILITY MANAGEMENT/REGULATION

An appropriate starting point for any discussion of the emerging changes in the regulation of electric utilities is a most remarkable quote from the cover of a well known magazine.

> The failure of the nuclear power program ranks as the largest managerial disaster in business history, a disaster on a monumental scale. The utility industry has already invested $125 billion in nuclear power, with an additional $140 billion to come before the decade is out, and only the blind, or the biased can now think that most of the money has been well spent. It is a defeat for the U.S. consumer and for the competitiveness of U.S. industry, for the utilities that undertook the program and for the private enterprise system that made it possible.

That quote is not from any raving consumer publication. It is from the cover of the February 11, 1985 edition of for Forbes Magazine, which styles itself a tool of capitalism. Although Forbes has only recently discovered the magnitude of the problem

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[100] See Comments of CFA at 84-107.

[101] Testimony of Dr. Mark N. Cooper, before the Subcommittee on Energy Conservation and Power on the Committee on Energy and Commerce, March 20, 1986.

facing the utility industry, hundreds of consumer groups have been cautioning and complaining for three, five, even ten years about the disaster that was being created.

2. PRUDENCE VERSUS EFFICIENCY

In spite of the obviousness of the managerial failure and our early warnings, the utility industry and its bankers insist that every penny, including unprecedently high rates of return, must be paid. That intransigence will ensure a radical restructuring of the process of decision making in the industry. It sets up a clash between two fundamentally different concepts for evaluating industry performance and, therefore, deciding what to build and what to cancel. The concepts are the prudency concept and the economic concept. We believe that we will end up somewhere in the middle, but with a much larger dose of economics in the regulatory process than we now have.

The prudency concept to which the industry clings says, simply, that it is only decision making, not actual decisions, that matter. As long as the proper inputs were used and the decision making process was rational, the outcome does not count. The industry expects to be rewarded for prudence, no matter how disastrous the result.

The economic concept underlying competitive markets works in exactly the opposite direction. It stresses outcomes. Inputs are irrelevant. It is results that are rewarded or penalized in the market.

3. THE GENERAL PRINCIPLE IN COMPETITIVE MARKETS

The key principle underlying this economic concept is that in a competitive market a firm with excess or excessively costly capacity does not earn a full rate of return on that capacity. In the short run, the firm would produce and sell goods as long as the price covered out-of-pocket (directly variable) costs and made some contribution to fixed costs. At the margin, no return on fixed costs would be earned. In the long run, the uneconomic capacity would be eliminated. Losses occur but they are transitional. To put it bluntly, the market has no mercy on mistakes -- whether or not they are retrospective.

The reason that companies with excess capacity cannot earn a full rate of return is that, in a competitive situation, they cannot force consumers to pay a price that is above the efficient costs of production. Competition will quickly erode any effort to set prices above efficient levels.

On the other hand, we believe that pure economics will not rule the regulatory process. Here is where simple economics is tempered by a recognition that electric utilities exist in a

unique environment. Only under the most extraordinary of circumstances will the harshest outcome of the marketplace, bankruptcy, be likely to occur. Absent imprudence on a scale large enough to precipitate a default, ratepayers must recognize the franchise nature of the electric utility. By imposing an obligation to serve and regulating the rate of return in exchange for the franchise, the decisions of the company are constrained. The ratepayers incur an obligation to the company that goes beyond the totally impersonal relationship of the marketplace.

Ratepayers will absorb part of the burden of mistakes in retrospect. In order to prevent bankruptcy, ratepayers meet their obligation to the utility by allowing rates above those that are economically justifiable. The competitive market does not afford such a luxury to companies that do not have the economic resources to generate the cash flows to cover their obligations.

The parallels to the cable industry are striking. An enormous price was paid for some systems. They were so far out of line with reproduction costs that they cast serious doubt on the judgement of the purchasers. Yet, Continental insists that because it projected revenue increases that would support that price, it must be paid every penny. Clearly, the lenders had their doubts, since they ran up the interest rates.

4. THE CABLE APPLICATION OF THESE PRINCIPLES

In September 1992, CFA outlined the application of this covenant between subscribers and the franchise holder to the cable industry.[102] The key sections are restated:

Some cable systems paid so much to purchase monopoly power

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[102] Dr. Mark N. Cooper, The Economics of Deregulation and Reregulation in the Cable Industry, A Consumer View.

that current rates make it difficult to cover costs, even at extremely high rates. That the owners have paid two or three times the reproduction costs, indicating that they have let previous owners capitalize their monopoly power, does present a problem.

However, regulation allows only the opportunity to achieve a rate of return commensurate with the risk of prudently incurred investment. If a regulated entity had paid an outrageous price for an asset, the regulator would typically disallow the expenditure as imprudent. If the disallowance is too large, regulators are forced to set up conditions under which the companies collect rates that are necessary to preserve the financial integrity of the entity, but above prudent costs.

For this small segment of cable systems which were transacted at extremely high prices, regulators should impose rate restraint, while protecting the financial integrity of the system. Rate restraint should come from re-prescription of depreciation rates, control over dividends, examination of affiliate transactions to ensure that profit is not being transferred to parent holding companies with sweetheart deals, etc.

Many systems were not sold. Many were sold early, before the market would support the full monopoly prices. Those systems that have been sold have engaged in aggressive depreciation policies, so that book values have declined. While the sales price at the margin established what the market would bear, and many systems pushed their prices up to those levels, most systems did not incur costs up to those levels. The existing owners realize their monopoly rents in the stream of income, rather than capitalizing them in the sales price. These rates can be easily lowered.

For all of these systems, regulatory accounting will dramatically alter the financial picture. As entities with monopoly power and long-lived plant, depreciation schedules should be slowed to reflect the economic reality. This will reduce pressure on rates.

In summary, the Commission will be faced with a small number of legitimate claims that using 1986 benchmarks creates untenable economic situations for the operators. These cases will occur where debt must be paid off. The Commission will be forced to allow rates above what the competitive market would bear, after

taking into account other sources of revenues and the returns being paid to bondholders. The Act clearly allows the Commission to take the overall return of the operator into account.[103] In the long term, the operator will earn a fair rate of return on the equity it truly risked in the enterprise.

V. RESPONSES TO SPECIFIC MISINTERPRETATIONS AND MISREPRESENTATIONS OF THE ACT BY THE CABLE INDUSTRY

A. A MULTICHANNEL VIDEO PROGRAMMING DISTRIBUTOR UNDER THE ACT MUST PROVIDE COMPARABLE PROGRAMMING

Several cable industry filings ask the Commission to define a multichannel video programming distributor as any entity which makes video programming available.[104] This definition ignores the statutory requirement that, to be considered under the effective competition test, an alternative provider must offer comparable video programming.[105]

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[103] See § 623(b)(2)(c)(vii) of the 1992 Cable Act.

[104] See e.g., Continental Cablevision at 6; TCI at 13; Cablevision Industries at 63; Time Warner at 11.

[105] § 623(l)(1)(B)(i). A number of cable industry comments urged the Commission to define "comparable" to mean "subscription" (i.e., if a consumer purchases the service, it must be comparable). However, if this is all Congress meant by "comparable" it would not have used the word; Congress separately required a 15 percent subscription rate to meet the effective competition test. See e.g., Comments of Time Warner at 11; Continental at 6; TCI at 14; Cablevision Industries at 67.

The cable industry would like the Commission to consider multiplexing of broadcast channels, all video dial tone services and even leased access users that multiplex as competitors to cable. By passing the 1992 Cable Act, Congress rejected the Commission's finding that six broadcast signals (or previously three signals) was effective competition to cable service (i.e. six signals is not equal to multichannel video competition). Asking the Commission to consider broadcasters that offer more than one channel of video programming by multiplexing as multichannel video distributors, would disregard the Commission's finding and the plain language of the statute requiring comparability.

Creating a presumption that all video dial tone services are comparable to cable does a great disservice to consumers. As CFA stated in its Comments (at p. 116), it is unclear how video dial tone will ultimately develop. It may begin as a complimentary service to cable rather than a truly comparable (and thus competitive) one as meant in the Act. It would compromise Congress' intent to ask the Commission to find automatically that all video dial tone services are competitors to cable without evaluating the nature of the services offered.

To consider leased access users that multiplex as an alternative provider for purposes of the effective competition test completely ignores the realities of leased access services.

It is abundantly clear, by virtue of the fact that cable operators have priced leased access charges so high as to be unaffordable for users, that cable operators have the incentive and ability to exert undue influence upon leased access users. A leased access user, who is totally dependent upon the incumbent cable company for it's service, is obviously not "an alternative provider" under the 1992 Cable Act.[106] This scenario also ignores the requirement that a competing service be comparable to the cable services offered.

The cable industry's concerns that Commission determination of comparability involves decisions based directly on content is unfounded. There is no danger of violating the 1st Amendment rights of cable operators under the Act. The Commission is not directed to look to the content of programming. Rather, it must evaluate the number and variety of offerings in general to judge comparability.[107] CFA urges the Commission to recognize its obligation under the Act to make certain that a multichannel

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[106] To find otherwise would be to create a "gatekeeper" problem similar to the one found in information services in telecommunications. If the entity that controls access to the home through ownership of the means of distribution also provides a competing service, the incentives to abuse their position is enormous.

[107] A broadcaster which offers two or three channels by multiplexing would not be "comparable" to a cable system offering 40 channels of programming from diverse sources. Similarly, a video dial tone service which offers primarily textual programming would not be a comparable service either. These determinations can be made without looking to the exact content of any of the programming.

video programming distributor offers comparable service to cable before it can be considered an alternative provider for the effective competition test.

The cable industry also asks the Commission to consider alternative services such as Direct Broadcast Satellite and Wireless Cable available to 100 percent of a franchise area as soon as the service becomes available. This presumption fails to take into account whether there are any impediments to receiving the service by members of the community, such as legal obstacles to mounting the necessary equipment on or outside one's home or other major cost constraints. CFA urges the Commission and local franchising authorities to make certain there are no such obstacles before declaring 100 percent availability of a new service in a franchise area.

B. EQUIPMENT PRICING METHODOLOGIES MUST BE BASED ON COST

A number of the cable industry commenters advocate equipment cost methodologies based on national averages[108] or load inappropriate costs in their proposals.[109] These suggestions completely ignore the Act's requirement that the Commission must

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[108] See e.g., Cablevision Industries at 38; Cox at 33; TCI at 38.

[109] See e.g., Continental Cablevision at 36; Cablevision Systems at 13; NCTA at 52.

establish the price or rate for equipment on the basis of cost.[110]

Looking to national average costs from vendors or cable systems is likely to yield skewed results because cable operators are the only current purchasers of most cable equipment. This approach does not take into account any affiliations which may exist between equipment suppliers and operators or sweetheart deals that may work to the disadvantage of subscribers. It is extremely difficult to discover what the true competitive market would look like and what kinds of benefits could flow from it without looking to actual costs instead of average costs. Similarly, any attempts to make decisions based on a limited sampling of vendors or systems would prevent the Commission from making determinations of actual equipment costs.

As for operators that propose to add additional costs such as a portion of joint and common costs from their systems, "system configuration costs" or other network costs, this too would prevent the development of competitive markets for equipment. CFA believes operators should be required to recover these types of non-equipment costs from appropriate network allocations among basic, cable programming services or "a la carte" services, rather than from equipment.

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[110] § 623(b)(3).

Any scenario which would permit recovery of underpriced equipment from overpricing other pieces of equipment or any other regulated service must be prohibited as well. A competitive market will not develop if operators are permitted to engage in this type of cross-subsidization. It would give the operator the ability to under-price competitive equipment to force competitors out of business, while recovering their "losses" from other equipment or services which are not available from a source other than the operator. CFA believes that under the Act, the Commission must prohibit all equipment pricing methodologies not based on actual cost of each piece of equipment.[111]

C. RESTRICTIONS ON CHARGES FOR SERVICE CHANGES REQUIRE COST-BASED CHARGES

The 1992 Cable Act requires the Commission to promulgate regulations which include "standards and procedures to prevent unreasonable charges for changes in the subscriber's selection of services or equipment subject to regulation under this

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[111] As we pointed out in our initial comments, promotional below-cost pricing should be allowed, without cost shifting to other regulated equipment or services. Under CFA's proposed regulatory model, cable operators would be allowed to keep all the additional profit generated by promotional practices that increase cable subscribership. See Comments of CFA at 84-107.

section..."[112] The Act mandates cost-based regulations for charges for "changing the service tier selected."[113] The cable industry would like the Commission to re-write this section so that it applies only to changes to or from the basic service tier. CFA maintains such a reading ignores the plain language of the Act.

The above cited provision appears in the rate regulation section of the Act. There is no limiting language indicating Congress' intent to restrict cost-based regulation to certain classes of service changes in either the statute or its legislative history.[114] CFA maintains that the plain language of § 623(b)(5)(C), mandating cost-based regulation of all changes in the selection of services or equipment subject to regulation under § 623, necessarily applies to all services except pay-per-view and premium channels offered on an "a la carte" basis.

The cable industry also seeks to set the rates for service changes at a level high enough to discourage repeated changes by subscribers. This too is an attempt to read authority into the Act which simply does not exist. The Act requires that service

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[112] § 623(b)(5)(C).

[113] Id.

[114] In some areas of the Act, where Congress intended to limit the reach of a provision, the language indicates it is only to apply to a certain subsection. There is no such language associated with this provision.